No. 80-2043

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IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT No. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, and LOUIS NESSIM,

Petitioners,

against

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS; and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF ON BEHALF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC., AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INDEPENDENT LITERARY AGENTS ASSOCIATION, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., and WRITERS GUILD OF AMERICA, EAST, INC. AS *AMICI CURIAE*

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The Association of American Publishers, Inc., *et al.*, submit this brief, *amici curiae,* pursuant to Rule 36.2 of the Rules of this Court, in support of respondents, Steven A. Pico, *et al.*, urging, alternatively, modification of the decision of the court below[1] by a holding that the actions of petitioners herein, the Board of Education of the Island Trees Union Free School District, *et al.*, have violated the First Amendment, or affirmance of that court's remand of the case to the district court for trial.[2]

The *Amici*

The Association of American Publishers, Inc. is the major national association for publishers of general and educational books in the United States. Its more than 300 members include large commercial book publishers and small or non-profit publishers, university presses and scholarly associations. The publishers of all the books removed or restricted by the Island Trees Board are or were members of the AAP.

American Booksellers Association, Inc. is a trade association composed of booksellers located throughout the United States. The Association has approximately 5,200 members consisting of private bookstores, university bookstores, and chain bookstores.

The American Society of Journalists and Authors, Inc. is the nationwide organization of independent nonfiction

1. The opinion below is reported at 638 F.2d 404 (2d Cir. 1980), *reh'g and reh'g en banc denied,* 646 F.2d 714 (1981).

2. The written consents of all parties to the filing of this brief are submitted herewith.

writers. The Society currently includes more than 600 leading freelance writers of magazine articles, trade books and other forms of nonfiction writing who have met the Society's standards of professional achievement.

Council for Periodical Distributors Associations is a national trade association for over 500 independent local wholesale distributors of magazines, comic books, paperback books, and newspapers.

Independent Literary Agents Association, Inc. ("ILAA") is a not-for-profit membership corporation consisting of professional literary agents whose principal purpose is to protect and enhance the interests of those agents and the authors they represent. Many of the clients represented by ILAA members are authors of literary works that have been selected for use in countless public school libraries and classrooms throughout the United States.

International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

National Association of College Stores, Inc. is a trade association composed of college bookstores located throughout the United States.

Writers Guild of America, East, Inc. is an organization of writers engaged in preparing literary material for various entertainment media.

Interest of the *Amici*

Amici represent the broad spectrum of book publishers, writers, and those who disseminate their works. All of the *amici* share a common interest in fostering and preserving a robust First Amendment, which serves as the cornerstone that enables *amici* vigorously to carry on their craft. *Amici* recognize that the free expression guarantees of the First Amendment are vital to the development of an informed citizenry. Nowhere is exposure to the diverse range of ideas contained in the works created and made available by *amici's* members more important than in the public schools of our nation, which help prepare students for their future roles in society. For these reasons, *amici's* members wholeheartedly subscribe to this Court's recognition that:

> "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 511 (1969).

The Unusual Nature of This Case

As a general proposition, *amici* recognize and endorse the propriety of investing school officials with broad latitude over curricular matters in connection with the conduct of our system of public education. But this Court has made clear that that latitude is not boundless. School officials—like all state officers—are, as they must be, bound by the dictates of the First Amendment.

The pursuit of educational policy by school authorities in the review, selection, adoption, purchase, reevaluation, removal or restriction of books and related educational materials necessarily entails express or implicit content-based choices and value judgments. Such judgments, nonetheless, may not violate the First Amendment, and an important aspect of the implementation of such policy involves a balancing of appropriate educational judgments with the dictates of the First Amendment. In the course of undertaking their book-selection decisions, therefore, school officials are presumed to be cognizant of, and sensitive to, the value placed by our constitutional system upon the availability of a wide range of philosophies and ideas inside the classroom and school library. When regular procedures governing selection and removal are adopted and followed, and when the bases for arriving at particular selection and removal decisions are consistent with educational policy and objectives, *amici* believe that important First Amendment interests are likely to be protected.

Countless book-selection decisions are undertaken nationwide each year without challenge. It is the rare case of selection or removal that causes constitutional concern. The startling facts presented in the instant case—and lucidly set forth in Judge Sifton's opinion below—represent such a case. Those facts graphically demonstrate what can occur when school officials fail to base their decisions on educational criteria—pursuant to established procedures—and, in the process, exhibit total insensitivity to the constitutional interests implicated in the book-selection/book-removal process.

The Books Removed

This case centers around the circumstances of the removal, by the Island Trees School Board, of a number of fine books—some even great books—from the curriculum and library shelves of the Island Trees School District.

Ten books in all were the focus of the Board's action.[3] Among the ten are: three works of fiction; four autobiographies; two standard literary anthologies; and one nonfiction book. Individually and taken as a group, the banned books are notable for their high literary and educational quality.

Of the three fictional works, two are novels written for general audiences; one is a juvenile book widely recommended for young adults. One of the novels, *The Fixer* by Bernard Malamud, won the Pulitzer Prize for Letters and the National Book Award. Although the Board apparently removed the work, *inter alia,* because of potential offense to Jews, in actuality the book is a powerful statement against anti-Semitism. The second novel, *Slaughterhouse-Five* by Kurt Vonnegut, Jr., was nominated for a National Book Award and won a number of other awards for literary achievement. Although the Board ostensibly removed *Slaughterhouse-Five, inter alia,* because of its anti-Christian sentiments, the book in actuality is recognized as reflecting, albeit with ironic subtlety, a humane world-view in harmony with the highest aspirations of Christian principles. The juvenile book, *A Hero Ain't Nothin' But a Sandwich* by Alice Childress, was removed by the Board because it contains "ungrammatical" ethnic

3. Nine books were barred outright from the library and curriculum. Richard Wright's *Black Boy* was left in the library on a restricted basis.

language and, in the Board's view, "anti-American" ideas. This book was also nominated for a National Book Award and won numerous other prizes; it was widely acclaimed both for literary achievement and for special pertinence to teen-age readers.

Although the Board objected to isolated excerpts containing "filthy" language, the four autobiographies, viewed as a whole, are all highly praised works. Three are by and about the difficult lives of members of minority groups; the fourth, *Go Ask Alice,* is the anonymous posthumous story of a teenage girl's tragic encounter with drugs. *Black Boy* is the autobiography of Richard Wright's early years. Wright, author of *Native Son,* is one of the most widely-acclaimed black authors in 20th-century American literature. *Soul on Ice* by Eldridge Cleaver became an immediate, albeit controversial, classic of black radical thought and philosophy. Although Board President Ahrens found the book "degrading to blacks," it won the Martin Luther King Prize and has been widely acclaimed for the quality of its literary craft. *Down These Mean Streets* is another powerful and, therefore, to some, controversial story of ethnic poverty as told by American-Puerto Rican author Piri Thomas.

The two banned anthologies are standard works which have enjoyed wide readership. *Best Short Stories by Negro Writers* is a collection of short stories by America's finest black writers. The book's editor, Langston Hughes, was himself a widely-acclaimed black poet and author, noted for his efforts to introduce other black poets and writers to a broader reading public. *A Reader for Writers,* edited by Professor Jerome Archer, is a collection of fine writing

by a long list of noted authors and essayists. This anthology was apparently listed as objectionable because of a single comment in an essay by Robert Penn Warren about Black Muslim leader Malcolm X, and banned by the Board because Board members found Jonathan Swift's classic essay, "A Modest Proposal," to constitute "irrelevant" and "inappropriate" reading.

The nonfiction work, *The Naked Ape,* is a popular book written by a respected and widely-read zoologist.

In the Appendix to this brief we discuss in greater detail the overall distinguished quality of the ten books banned from Island Trees.

The Circumstances Surrounding the Removals

The record compellingly demonstrates that, in ordering the book removals, the Island Trees Board did not rely upon their own (or others') considered educational judgments. Instead, the Board's actions amounted to an arbitrary assertion of a right of censorship, exercised with neither sensitivity, professionalism nor restraint, and unjustified by any accepted educational criterion.[4]

4. The Board's brief is noteworthy for paying mere lip service to any educational rationales for the books' removal. Instead, the Board seems to equate "moral value judgments," "respect for decency, authority and other traditional values," "personal value sets," "subjective content based decisions," "basic community values," and the like, with determinations of "educational suitability." Brief for Appellants at 23, 29. While *amici* do not urge that a school board's sense of community values may not be a relevant consideration in connection with curricular decisions, the assertion of such justifications without more, *e.g.,* an assessment of the literary and educational merits of the works involved—particularly in a book removal context—suggests that doctrinaire, as opposed to educational, motivations may well underlie the decisions.

The Board's disregard for arriving at educationally sound judgments as to the challenged books is reflected in, among others, the following facts:

- **The Board did not read the books prior to ordering their initial removal from the school library shelves.**
- **Prior to ordering the books' removal, the Board did not seek the views of the librarians or teachers who had initially selected the books through the regular acquisition channels.**
- **The Board ignored the recommendations of the School District Superintendent concerning appropriate procedures to follow in evaluating the works.**
- **The Board did not consult the standard, professional review media that are generally considered an indispensable aid in the evaluation process.[5]**
- **The Board did not take action at the instance of any student, teacher or citizen in the community, but in response to unknown members of a conservative citizen's group in another community.**
- **When an allegedly representative, ad hoc committee appointed by the Board recommended the reinstatement of most of the banned books, the Board largely disregarded their recommendations.**
- **The Board did not even apply its own reevaluation policy or the policy recommended by the State Board of Regents.[6]**

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5. All but one of the banned books had been recommended by professional reviewing and listing media as appropriate for use by junior and senior high school students.

6. Although the Board contends that it followed the Regents guidelines, in fact a fair reading of the guidelines indicates that the Board clearly violated several of the selection "criteria" there defined. *See, e.g.*, criterion (13) (the "value and impact of any literary work

(footnote continued on next page)

— No budgetary or physical constraints required the removal or restriction of the books, already purchased by school professionals, from the Island Trees libraries and classrooms.

Perhaps the most compelling evidence of the irrationality of the Board's actions is the overall quality of the books themselves. With due respect to the Board, *amici* are hard put to characterize these works, as the Board attempts, as lacking educational suitability as the result of "rampant obscenities, vulgarity, gross sexual allusions, blasphemies (in 1 book) and their general bad taste." Brief for Appellants at 34. *Amici* submit that such judgments as to the literary and educational quality of the works are understandable only in light of the Board's concession that the Board lacked "the technical expertise of their librarians or the knowledge of literature possessed by the teachers of English." Brief for Appellants at 23.[7]

Not surprisingly, in the light of such indicia of irregularity, the majority below expressed skepticism at the ostensible justifications, *e.g.*, indecent language, offered by

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will be judged as a whole"); criterion (15) (sexually-oriented materials "will be subjected to a test of literary merit and reality" and will not automatically be disqualified due to the fact that "sexual incidents or profanity" are present); criterion (11) ("materials will not be excluded because of the race, nationality, political, or religious views of the author . . ."); and criterion (1) (materials "should reflect the pluralistic character and culture of American Society"). University of the State of New York, State Education Department, Bureau of School Libraries, *Selection Guidelines: School Library Resources, Textbooks, Instructional Material* (undated).

7. Notwithstanding this admission, the Board elsewhere concludes: "*Someone* has to make a choice regarding the educational suitability of instructional materials. It has already been shown that the staff professionals are not the proper parties. . . ." Brief for Appellants at 35 (emphasis in original).

the Board for the removals. Both Judges Sifton and Newman properly were concerned, based on the record, that in fact the Board may have been motivated by ideological, as opposed to educational, interests, and that, accordingly, the professed bases for their actions "were simply pretexts for the suppression of free speech." 638 F.2d at 417. Indeed, Judge Sifton found the record before him to be so compelling that he was prepared to draw the inference that the Board's actions had as their purpose the establishment of the Board's personal standards of taste, morality and political belief "as the correct and orthodox ones for all purposes in the particular community." *Ibid.*[8]

The Potential Consequences of the Removals Beyond This Case

The implications of the Board's actions go well beyond the ten books involved. The capricious and ill-defined standards applied by the Board, if sanctioned, would enable school boards to ban from their school systems, for whatever reason, a limitless number of fine books expressing a broad range of ideas and philosophies. One can always find a "dirty" word, or controversial idea, or "ungrammatical" phrase, or determine that a work is "irrelevant" to the curriculum, as a supposed basis for barring a work from the classroom or school library. *Amici* submit that, unless such decisions are grounded in regularized procedures, designed to promote the best educational interests of the students and to minimize intrusions on constitutionally-protected expression, abuses of school officials' educa-

8. While not prepared, on the present record, to go so far, Judge Newman concurred that the rights of students and others are impaired where "books are the focal point of official action designed to suppress the ideas that the books contain." 638 F.2d at 435.

tional mandate and disregard for a diversity of expression are invited.

Moreover, in the absence of a coherent policy, decisions to remove particular books from the curriculum or school library are certain to convey the wrong constitutional message to the student body—irrespective of the extent to which discussion of the works technically may still be allowed in the classroom or to which the works may be available outside of school. For, as Judge Newman noted, works apparently singled out for no rational reason "signal to the students and the teachers an official message that the ideas presented in those books are unacceptable, are wrong, and should not be discussed or considered. The chilling effect of this message on those who would express the idea is all too apparent." 638 F.2d at 434.

There are other troubling implications of sanctioning the Board's conduct. For example, can the application of a standard of censorship be countenanced that is said to justify the ban of books of superior quality because of potential offense from an isolated excerpt or passage, especially if it is taken out of context? What course in modern literature, for example, can be fairly taught that excludes works that contain an occasional "indecent" word or sexual allusion? Indeed, what course in Shakespeare could be taught if sexual allusion were forbidden? And what course in social studies can be valid if realistic portrayals of poverty or repression or frank presentation of controversial issues are not considered to be a permissible part of the classroom curriculum or even the library collection?

In sum, in the view of the *amici*, permitting the Island Trees School Board to engage in its free-wheeling brand of censorship would surely lead to the improper exclusion of ideas, theories and philosophies from the libraries and classrooms of our nation's schools—contrary to the teachings of this Court and to the most basic tenets of the First Amendment.

Summary of Argument

The actions of school authorities, while entitled to considerable latitude in furthering the state's legitimate educational objectives, are nevertheless subject to First Amendment and other constitutional principles, as this Court has made amply clear.

The arbitrary and unprincipled removal of books from the Island Trees school libraries and curricula was properly recognized by the majority below to raise serious First Amendment concerns. Indeed, under this Court's prior decisions, such actions are in violation of the First Amendment and require judgment for respondents.

ARGUMENT

The Actions of the Island Trees School Board Involved Here Violate the First Amendment.

A. The Actions of School Authorities Are Subject to First Amendment Principles.

This Court has unequivocally and repeatedly affirmed the applicability of the First Amendment in the public school setting. The Court has cautioned: that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960); that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines School District, supra,* 393 U.S. at 506; and that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). *See also Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968) ("Our courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard fundamental values of freedom of speech and inquiry and of belief"); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943).

This Court has, of course, recognized that the special functions to be performed by our schools require "care and restraint" on the part of the judiciary in interfering in the day-to-day operation of those schools. *Epperson* v. *Arkansas, supra,* 393 U.S. at 104. Thus, in general, school authorities enjoy the right to prescribe curricula for their

schools, *id.* at 107, and to control disruptive conduct within their schools. *Tinker* v. *Des Moines School District, supra,* 393 U.S. at 507.

However, the courts may not, by reason of solicitude for the educational functions to be performed by the schools, abdicate their judicial function of assuring that the performance of the school authorities' duties does not exceed legitimate bounds and unduly interfere with fundamental constitutional rights. As Justice Jackson wrote for this Court in *West Virginia State Board of Education* v. *Barnette, supra*:

> "[W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." 319 U.S. at 640.

The requirement that the courts vigilantly assure that the operation of our schools does not violate students' and teachers' First Amendment rights reflects, in part, a realization that school boards or other officials charged with the inculcative educational functions may at times be less sensitive than the Constitution requires to the expression of controversial or unpopular points of view. This Court articulated these concerns in *West Virginia State Board of Education* v. *Barnette, supra,* when it observed that:

> "[Boards of Education] are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution . . . . There are village tyrants as well as village Hampdens, but none who acts under color of

law is beyond the reach of the Constitution." 319 U.S. at 637-38.

This recognition of the need for continuing vigilance by the judiciary over constitutionally-sensitive activity on the part of states and state school authorities has necessarily injected the courts into a variety of school-related disputes. *See, e.g., Meyer* v. *Nebraska,* 262 U.S. 390 (1923) (state cannot prohibit the teaching of foreign languages to elementary school pupils); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) (state cannot prohibit attendance at private schools); *Keyishian* v. *Board of Regents, supra* (teacher loyalty law stricken); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) (teacher may not be dismissed for speaking out on issues of public importance); *Epperson* v. *Arkansas, supra* (state cannot prohibit the teaching of evolution); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) (state cannot compel school attendance in violation of students' rights of free exercise of religion); *Goss* v. *Lopez,* 419 U.S. 565 (1975) (students are entitled to procedural due process prior to suspension); *Mount Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977) (a non-tenured teacher may not be fired because of his "exercise of constitutionally-protected First Amendment freedoms"); *Widmar* v. *Vincent,* —— U.S. ——, 50 U.S.L.W. 4062 (Dec. 8, 1981) (invalidating a university's refusal to allow a student religious group to use campus facilities as a "content-based exclusion of religious speech").

The fact that judicial oversight may create certain additional burdens on the courts' resources is a necessary consequence of the courts' role in preventing encroachments on cherished First Amendment freedoms.

B. The Actions of the Island Trees Board Were Properly Determined by the Court Below to Raise Serious First Amendment Issues; Indeed, Those Actions Were in Violation of the First Amendment.

The majority below had no doubts as to whether the Island Trees School Board's actions in connection with the book removals "directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas, supra,* 393 U.S. at 104. Judges Sifton and Newman differed only as to whether the present state of the record, on cross-motions for summary judgment, fully warranted the conclusion that the First Amendment rights of the students and others had been violated. Judge Sifton believed that the record supported such a conclusion; Judge Newman preferred to await a full trial.[9]

The majority was troubled both by the Board's failure to follow appropriate procedures and by the dubious motivations underlying the removals. Specifically, Judge Sifton cited the "unusual and irregular intervention" of the Board members in the book removal process, 683 F.2d at 414, as well as the Board's lack of "sensitivity or precision" in dealing with the First Amendment issues raised. *Id.* at 416. Judge Sifton concluded that:

> "[w]hat is required in order to avoid the effect of governing school affairs simply by a vague and indefinite pall of orthodoxy is the development of a set of sufficiently objective criteria for the identification of

9. Judge Newman concluded: "In my view, the case presents a sufficient claim of constitutional violation, but requires a trial to determine whether the claim is supported by the facts . . . . The allegations of the plaintiffs, fully presented in Judge Sifton's opinion, are clearly adequate, if proved, to sustain the conclusion that the school has violated the First Amendment." 683 F.2d at 432, 436.

> speech which will be objected to and a sufficiently regular procedure for applying those criteria in concrete cases to permit students to determine with a reasonable degree of certainty what speech will be prohibited and when." *Id.* at 418, fn. 13.

Judge Newman likewise voiced concern that the Board's conduct might be of the type:

> "that tends to suppress ideas–conduct conveying the message that some idea or viewpoint is not merely unsound, but is not acceptable to be aired within the school community. First Amendment values are not only precious; they are fragile. In the context of this case they are easily threatened by inhibiting action that stops short of prohibition or restrictive regulation." *Id.* at 433.

For Judge Newman, the issue at trial "should not be simply whether ideas have been suppressed, but whether the action taken, in light of its motivation, posed a sufficient *threat* to the suppression of ideas." *Id.* at 437, fn. 8 (emphasis in original).

In light of the facts presented, the majority below was demonstrably correct in subjecting the Board's actions to constitutional scrutiny. Moreover, in requiring the Board to demonstrate the educational soundness of its decisions respecting the books, the court below acted entirely consistently with this Court's prior decisions.

This Court has recognized that school officials must demonstrate a reasonable basis, grounded in procedural regularity, for abridging expression that is otherwise protected by the First Amendment. As Justice Brennan articulated in *Keyishian* v. *Board of Regents, supra*:

> "We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438; . . . 'Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity.' *Id.* . . . The danger of [a] chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed." 385 U.S. at 603-604 (citations omitted).[10]

The Second Circuit has recognized this salutary principle in a line of decisions, including *James* v. *Board of Education*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). In *James*, Judge Kaufman wrote for the Court:

> "The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent 'greater than is essential to the furtherance of' those interests . . . .
>
> By requiring the Board of Education to justify its actions when there is a colorable claim of deprivation of first amendment rights, we establish a prophylactic procedure that automatically tempers abuse of properly vested discretion." *Id. at* 574, 575.

10. Outside the school setting, it is of course settled law that attempted governmental interference with First Amendment rights must be subjected to stringent procedural safeguards. *See, e.g., Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (requiring "procedural safeguards designed to obviate the dangers of a censorship system"); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

See also Russo v. *Central School District No. 1*, 469 F.2d 623, 632 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Eisner* v. *Stamford Board of Education*, 440 F.2d 803, 809 (2d Cir. 1971).

Especially when, as in the instant case, the activity in question concededly involves content-based regulation of expression, such efforts at governmental control are to be viewed with the greatest of skepticism, *see, e.g., Widmar* v. *Vincent, supra; Carey* v. *Brown*, 447 U.S. 455 (1980); *Cohen* v. *California*, 403 U.S. 15 (1971); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and permitted only where the regulatory effort has been attended by carefully drawn guidelines and procedures designed to minimize the chilling impact of the regulation. *See, e.g., Freedman* v. *Maryland, supra; Bantam Books, Inc.* v. *Sullivan, supra.*[11]

Applying these settled constitutional principles to this case, *amici* respectfully submit that it is clear that the Island Trees School Board failed to sustain its constitutional burden. The Board did not act pursuant to "precision of regulation" or by resorting to "sensitive tools" designed to

11. Most recently, this Court has applied these principles in the university setting, requiring a showing that the attempted regulation of expression is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar* v. *Vincent, supra*, 50 U.S.L.W. at 4064. *See generally Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530, 540 (1980).

Even when evaluating regulations aimed primarily at conduct and only incidentally affecting speech, this Court has required that: the regulation must further an important or substantial governmental interest; and the restriction on expression be no greater than is essential to the furtherance of that interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). *See also Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 (1980) (applying *O'Brien*-type standards to commercial speech).

assure that legitimate educational interests would be furthered by its contemplated action, *Keyishian* v. *Board of Regents, supra,* 385 U.S. at 603-604; nor did it demonstrate that it had chosen the most narrowly drawn means necessary to achieve a justifiable result. *James* v. *Board of Education, supra,* 461 F.2d at 574; *Widmar* v. *Vincent, supra,* 50 U.S.L.W. at 4064. The Board failed to make any findings relating to the educational value of the books reviewed. The sole criteria against which the books were judged were the personal views, reactions and biases of the Board members to brief passages wrenched out of the context of the works as a whole. The Board largely ignored the recommendations of its own review committee, which was charged by the Board with the task of assessing the educational significance of the works. And, strikingly, nowhere did the Board exhibit any sensitivity to the potential impact on expression of its standardless proceedings.[12]

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12. We note a recent study of book selection and removal in the public schools, one of the principal conclusions of which is that:

> "Schools that do have written selection policies and reconsideration procedures appear to resolve conflicts with fewer restrictions on the instructional and library materials available to students, and therefore with less negative impact on the educational environment."

Limiting What Students Shall Read, Summary Report on the Survey "Book and Material Selection for School Libraries and Classrooms: Procedures, Challenges and Responses" (1981). Sponsored by the Association of American Publishers, the American Library Association, and the Association for Supervision and Curriculum Development.

The study's conclusion comports with the fundamental assumption underlying procedural due process: that rational procedures promote rational decision-making. Obligated to follow a procedure for reviewing challenged books and to articulate reasons for any removal, a school board—like any other instrumentality of the state—is less likely to base its actions on the personal caprices of its members (or the desires of individual community members).

Amici submit that none of the Board's proffered justifications for its conduct passes constitutional muster. The Board's allegations as to the supposed "vulgarity" and "rampant obscenity" of the removed books, Brief for Appellants at 34, are constitutionally defective given the Board's reliance upon snippets of language, and its failure to make any determinations considering the works as a whole. *See Miller* v. *California*, 413 U.S. 15 (1973).[13]

As for the Board's assertions that it may freely "transmit community values" and engage in "political indoctrination" as a part of its educational mission, Brief for Appellants at 10, *amici* submit that it is a fine line that separates acceptable transmission of community values and political socialization from efforts to impose authoritarian viewpoints and convey the message that the views which may be held by others are somehow unacceptable. Where, as here, the Board has failed to follow normal procedures so as to determine that the banned books threaten or in any way undercut the educational process in its schools, has so boldly flaunted its majoritarian instincts, and has totally failed to exhibit any sensitivity to the potential impact on the rights of expression of students, teachers, and

13. This Court's holding in *FCC* v. *Pacifica*, 438 U.S. 726 (1978), relied upon by the Board, requires no different result. The regulatory power there ceded to the FCC over "indecent" expression was expressly premised, *inter alia*, on specific statutory language forbidding the use of ". . . indecent . . . language by means of radio communications" and by the unique characteristics of the broadcasting medium. *Id.* at 735, 748-49.

We note, in addition, that the Court in *Pacifica* would have invalidated the FCC's censorship "if there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content. . . ." 438 U.S. at 746.

others, this Court should decline to cloak the Board's actions with legitimacy. Quite to the contrary, this Court should rule that the Board's actions have contravened the requirements of the First Amendment.

Conclusion

The constitutional considerations raised by this case warrant this Court's awarding judgment to respondents on the basis of the Island Trees School Board's violation of respondents' constitutional rights. In the alternative, this Court should affirm the decision below remanding the matter for a full trial.

Respectfully submitted,

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APPENDIX

APPENDIX

The Banned Books: Prizes, Awards, Recommendations, Favorable Professional Reviews and Listings

Fiction

THE FIXER by Bernard Malamud (1967)

Hardcover edition: Farrar, Straus & Giroux
Paperback editions: Dell; Pocket Books

- Pulitzer Prize in Letters (1967)
- National Book Award (1967)
- American Library Association/Best Books for Young Adults (1967)
- American Library Association/Outstanding Fiction for the College Bound (1976 and 1982)
- Citation for the National Book Award (Judges: John K. Hutchens, Mark Schorer, Anthony West):

  "We give the fiction award to Bernard Malamud's novel, of life in Czarist Russia, *The Fixer*: for the vitality and interest of its narrative; for the immediacy and importance of its theme; for the acuteness and maturity of its insights; for the warmth and humanity of its feeling; for the precision and clarity of its writing; and for the balance and sanity of its point of view.

  "We believe that there is a special cogency for Americans as for the inhabitants of all today's superstates in Mr. Malamud's story, concerned with the strains and anxieties that beset a man who finds himself a stranger in his community, and simultaneously a victim of the irrational preju-

dices of the crowd, and the arbitrary procedures of the agents of the remote and inaccessible state power which controls its destinies. We believe that in its bold attack on this theme, *The Fixer* upholds the tradition of immediacy which gave the novel much of its importance and its vitality in the past, which is its chief claim to our attention in the present, and its strongest hope for the future."

Favorable professional reviews and listings:

- School Library Journal, p. 268 (Oct. 15, 1966)
- Booklist, p. 237 (Oct. 15, 1966)
- Library Journal, p. 3470 (July 1966)
- Senior High School Library Catalog, p. 516 (10th ed. 1972)*

SLAUGHTERHOUSE - FIVE by Kurt Vonnegut, Jr. (1969)

Hardcover edition: Delacorte Press
Paperback edition: Dell

- National Book Award (nominee) (1970)
- National Institute of Arts and Letters (1970)
- Indiana Authors Day Award, Indiana University Writers Conference (1970)

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* It is also noteworthy, in view of the claimed effort to protect Jews from Mr. Malamud's book, that Malamud's earlier novel, *The Assistant,* won the "Brotherhood" Award of the National Conference of Christians and Jews in 1958. Under the terms of that award, the winning entry "must contribute to increased enlightenment, understanding, and respect for religious, racial, and nationality differences and the strengthening of a free and democratic society, based on the fundamental moral and ethical principles of all great religions." *Literary and Library Prizes,* 53 (R. R. Bowker, 9th ed. 1976). *The Assistant* also won the William and Janice Epstein fiction award, presented by the Jewish Book Council of the National Jewish Welfare Board. *Id.* at 114.

- American Library Association/Fifteen Years of Best Books for Young Adults (1975)
- American Library Association/Outstanding Fiction for the College Bound (1976 and 1982)

Favorable professional reviews and listings:

- School Library Journal, p. 462 (Jan. 15, 1969)
- Library Journal, p. 1021 (July 1, 1969)
- Senior High School Library Catalog, p. 537 (10th ed. 1972)

A HERO AIN'T NOTHIN' BUT A SANDWICH by Alice Childress (1973)

Hardcover edition: Coward, McCann & Geoghan
Paperback edition: Avon

- National Book Award (nominee/Children's Literature) (1974)
- Jane Addams Children's Book Award (honor book) (1974)*
- Woodward Park School Annual Book Award (1974)**
- American Library Association/Best Books for Young Adults (1973)
- American Library Association/Fifteen Years of Best Books for Young Adults (1975)

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* The Jame Addams Children's Book Award is sponsored jointly by the Jane Addams Peace Association and the United States Section of the Women's International League for Peace and Freedom. The Award is made "to encourage publication of books for children which are of literary merit and contain constructive themes" and that "best promote peace, the dignity and equality of all peoples, and social justice." *Literary and Library Prizes, supra,* at 263.

** The Woodward Park School Award is given "for the book for children which best demonstrates good human relations. Money is raised by the children of the school and given to an organization (designated by the winning author) which serves children." *Children's Books: Awards & Prizes* 109 (Children's Book Council 1979).

- School Library Journal/Best Books of the Year (1973)
- New York Times Book Review (Outstanding Books of the Year) (1973)

Favorable professional reviews and listings:

- Booklist, pp. 333, 336 (Nov. 15, 1973)
- Junior High School Library Catalog, p. 47 (Supp. 1974)
- Excerpt from *New York Times Book Review* (Nov. 4, 1973):

> "There are too few books that convince us that reading is one of the supreme gifts of being human. Alice Childress, in her short, brilliant study of a 13-year-old black heroin user, 'A Hero Ain't Nothin' But a Sandwich,' achieves this feat in a masterly way by telling a real story of the victims of today's worst urban plague, heroin addiction, and it reaffirms the belief that excellent writing is alive and thriving in some black corners of America."

Autobiographies

GO ASK ALICE (anonymous) (1971)

Hardcover edition: Prentice Hall
Paperback edition: Avon

- Christopher Book Award (1972)
- MAXI Award (1972)
- American Library Association/Best Books for Young Adults (1972)

- American Library Association/ Fifteen Years of Best Books for Young Adults (1975)
- School Library Journal/Best Books for Spring (1972)

Favorable professional reviews and listings:

- Booklist, p. 611 (Mar. 15, 1972); p. 633 (Apr. 1, 1972)
- Senior High School Library Catalog, p. 24 (Supp. 1973).

BLACK BOY by Richard Wright (1945)*

Hardcover edition: Harper & Brothers
Paperback edition: Harper & Row (Perennial Classic)

Favorable professional reviews and listings:

- National Council of Teachers of English/Booklist for Junior High School Students (1975)
- Senior High School Library Catalog, p. 419 (10th ed. 1972)
- American Library Association/Outstanding Biographies for the College Bound (1976 and 1982)

SOUL ON ICE by Eldridge Cleaver (1968)

Hardcover edition: McGraw-Hill
Paperback edition: Dell

- Martin Luther King Memorial Prize** (1970)

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* As an author, Wright won a prestigious Guggenheim Fellowship in 1939 (other winners that year were John Dos Passos, Harold Sinclair and Robert Penn Warren) and the NAACP Spingarn Medal for literary achievement (1941).

** The prize is awarded "for literary work reflecting the ideals to which Martin Luther King dedicated his life." *Literary and Library Prizes, supra,* at 414. (This is a British prize and was awarded to the British hardcover edition published by Cape.)

- American Library Association/Best Books for Young Adults (1968)
- American Library Association/Fifteen Years of Best Books for Young Adults (1975)

Favorable professional reviews and listings:

- School Library Journal, p. 150 (May 1968)
- Booklist, p. 1011 (May 1, 1968)
- Library Journal, p. 564 (Feb. 1, 1968)
- Senior High School Library Catalog, p. 42 (10th ed. 1972)
- Excerpt from a review by Robert Coles in the *Atlantic Monthly* (June 1968):

> "[Cleaver] has a sense of humor. He knows how to be astringent one minute, ironic the next. He can be tolerant and compassionate, far more so in my opinion than the man who wrote the introduction to this book. He is full of Christian care, Christian grief and disappointment, Christian resignation, Christian messianic toughness, and hope. He loves his lawyer, a white woman, and pours out his love to her in three beautiful, incredibly subtle and blunt and unsparing and unforgettable letters. How did he do it—learn to write, learn the really impressive theological subtleties that are addressed to his lawyer? (They remind one of Dietrich Bonhoeffer in jail, or Dostoevsky writing from the Underground.)"

DOWN THESE MEAN STREETS by Piri Thomas (1967)

Hardcover edition: Alfred A. Knopf
Paperback edition: Random House/Vintage

- American Library Association/Best Books for Young Adults (1967)

Favorable professional reviews and listings:

- School Library Journal, p. 3877 (Oct. 15, 1967)
- Library Journal, p. 1637 (Apr. 13, 1967)
- Booklist, p. 27 (Sept. 1967)

Anthologies

BEST SHORT STORIES BY NEGRO WRITERS edited by Langston Hughes* (1967)

Hardcover and Paperback editions: Little, Brown & Co.

(a collection of 47 short stories by noted black writers, including Ralph Ellison, Richard Wright, Frank Yerby, Jean Toomer, James Baldwin, Charles Chestnutt, and Paul Dunbar)

Favorable professional reviews and listings:

- School Library Journal, p. 1760 (Apr. 15, 1967)
- Library Journal, p. 595 (Feb. 1, 1967)
- Senior High School Library Catalog, p. 542 (10th ed. 1972)

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* As an author, Langston Hughes won a Guggenheim Fellowship (1935); a National Institute of Arts and Letters Award (1946); an Anisfield-Wolf Award (1953—for *Simple Takes a Wife*, published by Simon & Schuster) (sponsored by the Saturday Review and given to "the best work concerned with racial problems in the field of creative literature." *Literary and Library Prizes, supra*, at 37-38); and the NAACP Spingarn Medal (1960) (for literary achievement).

A READER FOR WRITERS edited by Jerome Archer* (1971)

Published by McGraw-Hill

(a collection of some 110 short essays or stories by noted writers, including John Updike, Mark Van Doren, Arthur Schlesinger, David Riesman, Samuel Johnson, Aldous Huxley, Robert Benchley, Francis Bacon, James Madison, Alexis de Tocqueville, Walter Lippman, C. P. Snow, Thomas Jefferson, Jonathan Swift, Joseph Conrad, James Thurber, E. B. White, and Lionel Trilling.)

— *See also* full Table of Contents at JA 132-137.

Non-Fiction

THE NAKED APE by Desmond Morris (1968)

Hardcover edition: McGraw-Hill
Paperback edition: Dell

• Library Journal, p. 91 (Jan. 1, 1968)

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* Jerome Archer is a Professor of English at Arizona University. He has been Chief Executive Officer of the Conference on College Composition and Communication and a Vice-President of the National Council of Teachers of English. Archer's anthology was not reviewed or listed in the standard school and school library media, apparently because the book was primarily distributed outside the high school market.